

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 664 of 1990

with

CRIMINAL APPEAL NO. 568 OF 91

with

CRIMINAL REVISION APPLICATION No 312 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ALLANA JUSAB

Versus

SUPDT.OF CUSTOMS BHUJ & 1

Appearance:

1. Criminal Appeal No. 664 of 1990
MR J.G. SHAH, SR. COUNSEL with Mr. Praful J. Bhatt
with Mr. P.B. Majmudar, Advocates for appellants.
MR. SUNIL C. PATEL, ADVOCATE FOR CUSTOMS
MR. S.R. DIVETIA, ADDL. P. P. for Respondent State.
2. Criminal Appeal No. 568 of 1991
MR. SUNIL C. PATEL, ADVOCATE, FOR CUSTOMS.
MR. S.R. DIVETIA, ADDL. P.P. FOR THE STATE
MR. C.H. VORA, ADVOCATE FOR THE RESPONDENTS
2. Criminal Revision ApplicationNo 312 of 1990
MR SUNIL C. PATEL, FOR CUSTOMS
MR S.R. DIVETIA, A.P.P. FOR THE STATE

MR. J.G. SHAH, SR. COUNSEL WITH MR. PRAFUL J. BHATT
& MR. MAJMUDAR, ADVOCATES FOR THE OPPONENTS.
MR PB MAJMUDAR for Respondent No. 2

CORAM : MR.JUSTICE N.J.PANDYA and

MR.JUSTICE H.L.GOKHALE

Date of Order: 14/02/97

ORAL ORDER (per N.J. Pandya, J)

First of the two appeals is filed by the convicted accused of Sessions Case No. 67 of 1989. While the appeal No. 568 of 1991 as well as the Revision Application No. 312 of 1990 respectively are filed by the Customs Department. The appeal is filed by the said Department in respect of the orders of acquittal passed by the learned Sessions Judge, Kutch-Bhuj for the original accused No. 4 in the said Sessions Case. The Revision Application is filed for enhancement of sentence awarded to the convicted accused.

2. Charge against the all the four accused before the trial court was under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985. 3 of them came to be convicted and rigorous imprisonment for 10 years was awarded and fine of Rs. 1 lakh was imposed on them and in default they were to undergo two years rigorous imprisonment.

3. The case of the prosecution against the accused appellant is that accused appellant No. 1 had visited Pakistan and had contacted one Gufar Sheth of that country and had arranged with him to bring in 50 kgs. of brown sugar within this country. As a part of this arrangement on night of 16/17.1.1989 as also on the night of 17/18.1.1989 respectively 6 kgs. and 3 kgs. of brown sugar was brought in. Initially it was kept at the place of Ahmad Bala. The said commodity was delivered at the place of accused No. 3 and thereafter it was taken to an area called Kaladungar of Khavada, District Kutch.

4. The Customs Authorities had reliable information about this likely import and therefore they were keeping a watch. However, the aforesaid quantity of 9 kgs. of brown sugar would be successfully brought into the country and that information was obtained by the Customs Authorities through their sources. Having come to know the likely place of hiding of this commodity they started search in the area and have stumbled upon the entire quantity of 9 kgs of brown sugar on two different parts

on two different dates. The Customs Authorities therefore started search for these suspects and have succeeded in getting all four of them and they were interrogated. Statements of three of them were recorded and they are at pages 212, 206, and 209 of the paper book. All recorded on 22.2.1989.

5. Needless to say statements under Section 67 of the N.D.P.S. Act are of confessional in nature and are heavily relied on by the Customs Authorities who have filed the complaint in the trial court in respect of the offences committed under the NDPS Act.

6. The learned trial judge of Kutch-Bhuj by his the judgement dated 25.6.1990 has held 3 of them guilty and awarded the sentence as stated above. Original accused No. 4 came to be acquitted.

7. Several questions were sought to be raised before us on behalf of the convicted-appellants by the learned senior counsel Mr. J. G. Shah. One of them, however, in our opinion, will go to the root of the matter. The search party having found the articles had brought the same to the customs office and the conversation in that regard has been clearly stated by PW 1 at Exh. 15, page 18 as also by the official of Customs Department Mr. Meena PW 9, who was working as an Inspector in Bhuj office of the Customs Department. His deposition is recorded at Exh. 36, page 38 onwards.

8. Initially, the Customs department had chosen to test this matter on the spot with the test kit which they were carrying and thereafter having brought the quantity at the customs office and had kept in a sealed condition in cupboard which was also in turn sealed with their respective seals. A portion of it was drawn as sample and was sent for analysis to their own laboratory at Kandla. That laboratory not being fully equipped with, the Head Office from Delhi directed the Bhuj office of customs department to draw sample and send it for analysis at the Forensic Science Laboratory, Ahmedabad. This came to be done only in the month of April, 1989. All these things are definitely proved by producing the relevant material on record. They are forwarding notes, receipt of the F.S.L. Ahmedabad who received the sample for analysis purpose and reply of the F.S.L. also after analysing the samples.

9. The point raised by the learned senior counsel Mr. Shah is that how the muddamal was handled from January 30, 1989 till April 4, 1989 when the sample came

to be drawn and sent to F.S.L. Ahmedabad, there is no material on record at all. The Department ought to have produced the material like sample register, the person who was in charge of that particular register and as also the container in which it was kept, how the samples were handled, by whom they were brought out for the purpose of sending it to F.S.L. and how were they kept back till it came to be destroyed under the provisions of Section 52A which the department has chosen to do with the help of the District Collector, in presence of an Executive.

10 The gap of period of little over two months in keeping of muddamal remains totally unexplained. The department ought to have produced the material as indicated above as to how the muddamal was kept, by whom was it handled and how it was despatched to the laboratory. In absence of these material the finding of the F.S.L. that on analysis the samples were found to be containing diacetyl morphine (heroin), an ingredient of brown sugar, in our opinion case against the accused cannot be made out. The reason is that as briefly stated above, the articles were not taken from the possession of any of the accused. They are taken out of a spot in wilderness. Thereafter, though the aforesaid statements are relied on without entering into at great length, there may be a question of missing link between general evidence thereby the accused can be connected with the said find of the narcotics and the accused. Leaving it aside when the aforesaid gap of period of little over two months with regard to the handling of muddamal is not explained, it is difficult to say that what was found from the place by the customs officers during search carried out near Dungarward area was the very article which was retained by the customs authorities by the said period of two months and it was from that very quantity that samples were drawn and sent to the F.S.L. which on analysis were found to be brown sugar.

11. The Supreme Court in VALSALA VS. STATE OF KEARALA reported in Judgement Today 1993(4) SC 549 has dealt with more or less a similar situation. Their Lordships have been pleased to hold that absence of the details on record would clearly make the case of the prosecution very weak and the conviction cannot be sustained. We wholeheartedly agree with this and accordingly hold that the conviction of any of the accused cannot be sustained. The appeal No. 664 of 1990 filed by the convicted accused is allowed. For the aforesaid reasons Criminal Appeal No. 568 of 1991 filed by the Customs Department is dismissed. Criminal Revision Application No. 312 of 1990 in view of the

aforesaid orders does not survive. Rule therein is discharged. The accused-appellants are ordered to be set at liberty forthwith, if not required for any other purpose. Fine, if paid, is ordered to be refunded.

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